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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services	)	CC Docket No. 96-21

BELLSOUTH COMMENTS

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SUMMARY

The *NPRM*'s proposal to require, in essence, structural separation for the provision of out-of-region, interexchange service by BOCs is contrary to judgments recently made by Congress in the Telecommunications Act of 1996 (the "1996 Act") which was enacted February 8, 1996. Classifying BOCs as dominant carriers in the provision of out-of-region interexchange service, except when such service is provided in accordance with structural separation guidelines, will effectively force the BOCs to utilize separate subsidiaries for these services.

The purported basis for imposing dominant carrier regulation on BOCs providing out-of-region interexchange service is to ensure that BOCs do not gain an unfair competitive advantage through discriminatory practices or cross-subsidization. There is no basis, however, for imposing dominant carrier status on the BOCs provision of out-of-region interstate, domestic, interexchange service because BOCs have no market power, with or without structural separation. Further, any cross-subsidization or discrimination concerns are groundless when the interexchange services at issue are provided exclusively to out-of-region customers and BOC rates are governed by price cap regulation. The Commission has already addressed any such concerns in-region by subjecting BOCs to dominant carrier regulation in the provision of local exchange service.

Market power in a relevant market — *i.e.*, the ability to control prices in that market— is the touchstone for determining whether a carrier is dominant. In assessing market power, the Commission makes this determination on a market-by-market basis. Thus, the Commission has held that a carrier (*e.g.*, AT&T) with market power in only one market — or even a portion of the relevant market under study— will not be declared dominant for all markets. Dominance in one market does not automatically translate into dominance in another market.

BOCs do not have market power in the interstate, domestic, interexchange services market. Out-of-region, a BOC providing interexchange service has no advantage over incumbent interexchange providers by virtue of being a LEC. The BOC has no "bottleneck facilities" out-of-region that it could leverage in connection with the origination of calls. Essentially, all calls would be originated on unaffiliated LEC facilities, over which the BOC has no control. The BOC will, accordingly, pay the originating LEC's tariffed rates for originating access. Much of the traffic will, likewise, terminate on unaffiliated LEC facilities. Again, the BOC will pay the terminating LEC's tariffed rate for terminating access. Some customers may call numbers served by the BOC's own LEC facilities. For this subset of a BOC's interexchange traffic, the BOC will be the terminating LEC. In these cases, however, the BOC will be obliged to pay its own tariffed rate for terminating access — the very same access charges paid by all interexchange carriers.

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COMMENTS

BellSouth Corporation ("BellSouth"), by its attorneys, hereby submits comments in response to the Commission's *Notice of Proposed Rule Making*, CC Docket No. 96-21, FCC 96-59 (Feb. 14, 1996), 61 Fed. Reg. 6607 (1996) ("*NPRM*"). The *NPRM*'s proposal to require, in essence, structural separation for the provision of out-of-region, interexchange service by BOCs is contrary to provisions of the Telecommunications Act of 1996 (the "1996 Act"),[1] which permit Bell Operating Companies ("BOCs") to provide out-of-region service without a structural separation requirement. Moreover, there is no basis for treating BOCs as dominant carriers in the provision of out-of-region, interexchange service.

I. IN THE 1996 ACT, CONGRESS EXPRESSLY REJECTED A STRUCTURAL SEPARATION REQUIREMENT FOR OUT-OF-REGION SERVICES

The FCC proposes structural separation requirements for non-dominant regulation of BOCs seeking to provide out-of-region, interexchange services.[2] Specifically, the *NPRM* seeks "to ensure that sufficient regulatory safeguards are in place to prevent a BOC from gaining any unfair competitive advantage, either through unreasonably discriminatory practices or cross-

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1 Telecommunications Act of 1996, 104 Stat. 104 (1996).

2 *NPRM* at ¶ 12.

subsidization, that could arise because of its ownership and control of local exchange facilities."[3] In the Telecommunications Act of 1996, however, Congress authorized BOC entry into out-of-region services:

> A Bell operating company or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region states after the date of enactment of the Telecommunications Act of 1996. . . .[4]

Moreover, Congress considered and rejected a separate subsidiary requirement for out-of-region services:

> The services for which a separate affiliate is required by paragraph (1): Origination of interLATA telecommunications services, *other than out-of-region services* described in section 271(b)(2).[5]

In short, the law now explicitly permits the BOCs to offer out-of-region interexchange service directly or through an affiliate, without any structural separation requirement. As a result, any action by the FCC, such as the proposed dominant carrier regulation which effectively forces the use of a structurally separate affiliate for out-of-region services, is directly contrary to the will of Congress, as expressed in the statute itself.

Senator Pressler, Chairman of the Committee on Commerce, Science, and Transportation, made clear his view that the FCC's proposed action vitiates one of the accomplishments of the 1996 Act:

> Congress has established a clear pro-competitive, deregulatory national telecommunications policy. The FCC . . . now has the straightforward task of implementing that Congressional policy. So I am quite perplexed to find that the FCC is not able to take expeditious action on a number of clear self-executing items in the Act. . . . New U.S.C. Section 271(b)

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3 *NPRM* at ¶ 7.

4 47 U.S.C. § 271(b)(2) (1996).

5 47 U.S.C. § 273(a)(2)(B)(i) (1996).

> provides that a Bell company "may provide interLATA services originating outside its in-region states after the date of enactment. . . ." New section 272(a)(2)(B)(ii) explicitly provides that the newly enacted separate affiliate requirements do not apply to out-of-region services. Nevertheless, the FCC on February 14, 1996, proposed that out-of-Region services would be sanctioned only upon the establishment of a separate subsidiary by Bell companies.[6]

The Commission's proposal to require structural separation for BOC out-of-region services in order to obtain regulation on a non-dominant basis is contrary not only to the specific provisions of Sections 271 and 273 recited above, but also to the entire purpose of the 1996 Act. In this legislation, Congress sought "to provide for a procompetitive, deregulatory national policy framework."[7] The Act removes barriers to entry[8] and mandates regulatory reform and forbearance.[9] The Act also seeks to eliminate micromanagement of the telecommunications industry.[10] As the drafters of the Act recognized: "We can no longer keep trying to fit everything into the old regulatory boxes - unless we want to incur unacceptable economic costs, competitiveness losses, and deny American consumers access to the latest products and services."[11]

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6 Letter from Senator Larry Pressler (R-SD), Chairman Senate Commerce Committee, to Federal Communications Commission (Feb. 21, 1996), *reprinted in* Daily Report for Executives (BNA) No. 36, at M-1 (Feb. 23, 1996).

7 H.R. Conf. Rep. No. 458, 104th Cong., 2d Session 1 (1996).

8 47 U.S.C. § 253 (1996).

9 47 U.S.C. §§ 10, 11 (1996).

10 141 Cong. Rec. S. 7885 (June 7, 1995).

11 141 Cong. Rec. S. 7886 (June 7, 1995). BellSouth opposes dominant carrier regulation because it creates market inefficiencies. The Commission itself has recognized that dominant carrier regulation "inhibits [carriers] from quickly introducing new services and from quickly responding to new offerings by . . . rivals." *See AT&T Non-Dominance Proceeding* at ¶ 27. Further, the longer tariff

Despite this clear directive from Congress, the Commission now proposes to fit BOC out-of-region services into the "old regulatory boxes" that the bill intended to shatter. Classification of BOC out-of-region services as dominant when not structurally separated will effectively force the BOCs to utilize separate subsidiaries for these services, contrary to the express will of Congress.

The fact that the Commission may only impose its structural separation requirement for some interim period makes it no less repugnant to the 1996 Act. Effective February 8, 1996, the BOCs were permitted to provide out-of-region services without *any* structural separation. If and when the FCC adopts its proposed rules, the FCC will negate that benefit of the legislation until such time as the FCC chooses to restore it. As a result of the *NPRM*, the BOCs are on notice that if they do what Congress permitted them to do, they do so at their own peril and may have to reorganize their businesses for some "interim " period,[12] or accept regulation as a dominant carrier, just as they begin offering out-of-region services.

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filing requirements associated with dominant carrier regulation prevent dominant carriers from initiating price reductions because their competitors can "use the regulatory process to delay, and consequently, ultimately thwart" these price reductions. *Id.* Finally, dominant carrier regulation imposes compliance costs on "dominant" carriers and administrative costs on the Commission. *Id.*

[12] Interim rules and policies have a tendency to remain in place for a long time. For example, two years after the Commission's cellular structural separation rule was adopted in 1981, the Commission said it would review whether the rule was still necessary by 1985. *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies,* 95 FCC 2d 1117, 1140 (1983), *recon.*, 49 Fed. Reg. 26,056, 26,063, *aff'd sub nom. Illinois Bell Telephone Co. v. FCC,* 740 F.2d 465 (7th Cir. 1984), *decision on recon. aff'd sub nom. North American Telecommunications Ass'n v. FCC,* 772 F.2d 1282 (7th Cir. 1985). The FCC never conducted that promised review, and as a result ten years later the rule remained on the books. In 1995, the Commission's retention of the rule was held to be arbitrary and capricious. *Cincinnati Bell Telephone Co. v. FCC,* 69 F.3d 752, 767-68 (6th Cir. 1995).

II. THERE IS NO BASIS FOR TREATING NON-STRUCTURALLY SEPARATED BOC OUT-OF-REGION SERVICES AS DOMINANT

The Commission proposes to regulate BOCs providing out-of-region, interstate services as dominant, unless the service is provided pursuant to specified separation requirements.[13] The purported basis for imposing dominant carrier regulation on BOCs providing such service is to ensure that BOCs do not gain an unfair competitive advantage through unreasonably discriminatory practices or cross-subsidization.[14] There is no basis, however, for imposing dominant carrier status on the BOCs provision of out-of-region services because BOCs are not in any way dominant in the provision of interstate, domestic, interexchange service, with or without structural separation.

A. The *NPRM* Does Not Apply The Proper Test For Determining Dominance

In essence, the Commission proposes to regulate BOCs as dominant in the provision of out-of-region, interexchange services because of their market power in the provision of local exchange services.[15] The Commission references back to the *First Report* in the *Competitive Carrier* proceeding to support its position that BOCs should be regulated as dominant.[16] The "all services" approach followed in the *First Report*, however, has subsequently been rejected by the

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13 *NPRM* at ¶ 13.

14 *NPRM* at ¶ 7.

15 *NPRM* at ¶¶ 9-10.

16 *Id.*; *see Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, *First Report and Order*, 85 FCC 2d 1 (1980) (*"First Report"*).

Commission. The Commission now determines dominance on the basis of a firm's market power in the particular market involved.

In the *First Report*, the Commission proposed for the first time "to distinguish between carriers on the basis of their dominance or power in the marketplace and apply different regulatory rules to each."[17] The touchstone for determining whether a carrier would be considered dominant was whether it had market power — the ability to control price.[18] Based on this definition, it found AT&T and independent local exchange companies to be dominant.[19] At the time, AT&T possessed control of bottleneck local exchange facilities, had market power in interexchange service, and retained significant market power in the private line service market.[20] Accordingly, AT&T was considered dominant.

Because the independent LECs controlled local exchange facilities and offered interstate services on a non-competitive basis with AT&T, these carriers also were deemed dominant.[21] Similarly, Western Union also was considered dominant because of its virtual monopoly of

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17 *First Report*, 85 FCC 2d at 6.

18 *Id.* at 10, 21. As the Commission noted, "a firm with market power is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest. This may entail setting price above competitive costs in order to earn supra normal profits, or setting price below competitive costs to forestall entry by new competitors or to eliminate existing competitors." Id at 21.

19 *Id.* at 10-11. The Commission also found Western Union, domestic satellite carriers, resellers of domestic satellite services, and miscellaneous common carriers as dominant. *Id.* at 11.

20 *Id.* at 23.

21 *Id.* at 24.

Telex/TWX service.[22] Although many of these carriers also offered services in markets where they did not have market power, the Commission deemed the carrier to be dominant if it held market power in *any* market.[23] In essence, the FCC adopted an "all-services approach" for determining whether a carrier was dominant or non-dominant: Dominance in *one* service subjected a carrier to dominant regulation in the provision of *all* services. Accordingly, control of bottleneck facilities was prima facie evidence of dominance in all markets.[24]

Recently, the FCC has completely abandoned its "all-services approach" for determining dominance. In finding AT&T non-dominant in the domestic, interexchange service market, the Commission issued an Order which unequivocally overturned the "all-services approach."[25] Specifically, the Commission stated:

> The Commission has never definitively concluded, either in its rules or the *Competitive Carrier* orders, that a carrier must demonstrate that it lacks the ability to control the price of every service that it provides in the relevant market before the Commission can classify that carrier as non-dominant. . . .Moreover, we do not believe that language in other proceedings that may be viewed as characterizing the *Competitive Carrier* standard as an all-services standard is binding as a matter of law. *It is at most a policy with which, for the reasons discussed below, we do not now agree.*[26]

In the *AT&T Non-Dominance Proceeding*, the Commission determined that it would classify AT&T as non-dominant for purposes of the interstate, domestic, interexchange

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22 *Id.* at 24. Domestic satellite carriers, resellers of domestic satellite service, and miscellaneous common carriers also were considered dominant. *Id.* at 26-28.

23 *Id.* at 22 n.55.

24 *Id.* at 21.

25 *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC 95-427, Oct. 23, 1995 ("*AT&T Non-Dominance Proceeding*").

26 *Id.* at ¶¶ 29-30 (emphasis added).

marketplace, even though AT&T continued to be classified as dominant in the provision of international services.[27] Thus, AT&T was subject to different regulation depending upon the market under consideration.[28] Further, the Commission found AT&T non-dominant in the interstate, domestic, interexchange market even though AT&T continued to have market power concerning certain services within this market.[29] The Commission found that the services in which AT&T remained dominant were only a *de minimis* set of services within the entire domestic, interexchange service market and, thus, did not give AT&T market power over the market as a whole.[30]

Thus, the *AT&T Non-Dominance Proceeding* rejected the "all services" approach and adopted a more narrowly focused test. Under the current test, as set forth in this proceeding, a carrier will be deemed non-dominant in the market for interstate, domestic, interexchange

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27 *Id.* at ¶ 1.

28 A similar analysis was followed by the Commission with regard to AT&T in the *Interexchange Competition* proceeding. *See Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, *Notice of Proposed Rulemaking*, 5 F.C.C.R. 2627 (1990); *Report and Order*, 6 F.C.C.R. 5880 (1991) ("*Interexchange Competition Order*"); *Order*, 6 F.C.C.R. 7255 (CCB 1991); *Memorandum Opinion and Order*, 6 F.C.C.R. 7569 (1991); *Memorandum Opinion and Order*, 7 F.C.C.R. 2667 (1992); *Memorandum Opinion and Order and Order on Reconsideration*, 8 F.C.C.R. 2659 (1993); *Second Report and Order*, 8 F.C.C.R. 3668 (1993); *Memorandum Opinion and Order*, 8 F.C.C.R. 5046 (1993); *Memorandum Opinion and Order on Reconsideration*, 10 F.C.C.R. 4562 (1995).

29 Specifically, the Commission found that AT&T remained dominant in the provision of 800 directory assistance and analog private line services. *AT&T Non-Dominance Proceeding* at ¶ 142.

30 *Id.* at ¶¶ 103, 105.

telecommunications services if it lacks market power in that market as a whole, even if the carrier is able to control the price of discrete services within the overall market.[31]

B. Based On The Commission's Current Test for Determining Dominance, BOCs Are Non-Dominant In The Interstate, Domestic, Interexchange Telecommunications Services Market

As stated above, market power in the relevant market — *i.e.*, the ability to control prices in that market— is the touchstone for determining whether a carrier is dominant. In assessing market power, the Commission makes this determination on a market-by-market basis. Thus, a carrier with market power in only one market — or even a portion of the relevant market under study— will not be declared dominant for all markets.

In making its market power assessment, the Commission focuses on: (1) the company's market share in the relevant market; (2) the supply elasticity of the relevant market; (3) the demand elasticity for the company's customers; and (4) the company's cost structure, size, and resources.[32] Based on these factors, BOCs do not have market power in the interstate, domestic, interexchange services market.

Market Share. Until February 8 of this year, BOCs were precluded by the MFJ from entering the interstate, domestic, interexchange marketplace.[33] They now are permitted to offer

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31 *Id.* at ¶¶ 2-21, 25.

32 *Id.* at ¶ 38.

33 Modification of Final Judgment, Section II(D)(1), *United States v. Western Elec. Co.*, Civil Action No. 82-0192 (Aug. 24, 1982); Telecommunications Act of 1996, § 601.

interexchange services only out-of-region.[34] Given that BOCs have been precluded from offering interstate, interexchange services, they will be new entrants into the market.

Supply Elasticity. According to the Commission, supply in the interstate, domestic, interexchange market is sufficiently elastic to constrain unilateral pricing decisions by the carrier with the largest market share — AT&T.[35] New entrants, who have essentially no out-of-region facilities, much less bottleneck control, have no ability to increase prices by restricting supply. If supply in this market is sufficiently elastic to constrain the largest market participant, it certainly is sufficient to constraint new entrants such as the BOCs.

Demand elasticity. Because the BOCs have been precluded from entering the interexchange market by the MFJ, they are new entrants and have no out-of-region subscribers in the relevant market. Lacking any market share and any customers, they have no ability to raise prices to their customers. The only ways they can develop an out-of-region customer base are to stimulate new demand through high quality services, innovative service offerings, or to price their services below existing carriers. Accordingly, there is no issue concerning the demand elasticity of BOCs out-of-region customers in the interstate, domestic, interexchange services market.

Cost Structure, Size, and Resources. In analyzing a company's cost structure, size, and resources for purposes of determining dominance in a relevant market, the issue is whether the company will have advantages that will likely preclude the effective functioning of a competitive

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[34] 47 U.S.C. § 271(b)(2) (1996). BOCs are not permitted to enter the interstate, domestic, interexchange service market in-region until they satisfy the criteria and follow the procedures set forth in Section 271.

[35] *AT&T Non-Dominance Proceeding* at ¶ 58.

market.[36] None of the BOCs is comparable in size or resources to AT&T. Moreover, the BOCs' cost structure for the provision of out-of-region interexchange services, where they will be new entrants with no exchange facilities or customers, places them at a distinct competitive disadvantage when compared with the existing facilities-based carriers, such as AT&T, MCI, and Sprint.

The BOCs will have to deploy new facilities or resell other carriers' services. Their ability to use their existing sales, marketing, and billing organizations in this new market is constrained by the Commission's existing nonstructural safeguards.[37] Thus, they will have no cost advantages over the principal incumbent firms in the relevant market. To the extent the BOCs may have low costs, large size, considerable resources, financial strength, and technical capabilities, these factors will enable them to provide effective competition to the incumbent, interexchange carriers, thereby serving the public interest.[38] Accordingly, the cost structure, size, and resources of the BOCs are likely to lead to a more competitive market, rather than impair the effective functioning of the market.

III. THE FCC's CONCERNS REGARDING CROSS-SUBSIDIZATION AND INTERCONNECTION DISCRIMINATION ARE WITHOUT MERIT

The Commission's proposal to regulate BOCs as dominant in the provision of interexchange service, unless they comply with structural separation requirements, bears no relation to the BOCs' market power with regard to interexchange services. It appears that the

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[36] *See AT&T Non-Dominance Proceeding* at ¶ 73; *Interexchange Competition Order*, 6 F.C.C.R. at 5891-92.

[37] *See, e.g.*, 47 C.F.R. Parts 64, 69.

[38] *See United States v. FCC*, 652 F.2d 72, 106 (D.C. Cir. 1980).

Commission tentatively decided to deem the BOCs dominant merely to ensure that BOCs cannot leverage their position in the local exchange marketplace. Any such concerns are groundless, however, when the interexchange services at issue are provided exclusively to out-of-region customers. Moreover, as stated below, the Commission has already addressed any such concerns in-region by subjecting BOCs to dominant carrier regulation in the provision of local exchange service.

A. Control Over In-Region Local Exchange Facilities Does Not Create Dominance In The Entire Interstate, Domestic, Interexchange Service Market, When Only Out-Of-Region Services Are Considered

As providers of local exchange services, BOCs are regulated as dominant carriers and must provide local exchange access at tariffed rates pursuant to Title II of the Communications Act. All BOC LECs are subject to the Commission's price cap regulations.[39] These regulations eliminate any ability or incentive to cross-subsidize interLATA service, since the price cap LEC cannot raise prices on other services to support underpriced interexchange service. Therefore, no additional safeguards are required.

Out-of-region, a BOC providing interexchange service has no advantage over incumbent interexchange providers by virtue of being a local exchange carrier ("LEC"). The BOC has no "bottleneck facilities" out-of-region that it could leverage in connection with the origination of calls. Essentially, all calls would be originated on unaffiliated LEC facilities, over which the

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[39] *See Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *First Report and Order*, 10 F.C.C.R. 8962 (1995); *see also Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 5 F.C.C.R. 6786 (1990), *recon.*, 6 F.C.C.R. 2637 (1991), *aff'd sub nom. National Rural Telecom Assoc. v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

BOC has no control.[40] The BOC will, accordingly, pay the originating LEC's tariffed rates for originating access. Much of the traffic will, likewise, terminate on unaffiliated LEC facilities. Again, the BOC will pay the terminating LEC's tariffed rate for terminating access. Some customers may call numbers served by the BOC's own LEC facilities. Thus, for this subset of a BOC's interexchange traffic, the BOC will be the terminating LEC. In these cases, however, the BOC will be obliged to pay its own tariffed rate for terminating access — the very same access charges paid by all interexchange carriers. Further, the BOC's LEC access charges are subject to a price cap to ensure that rates are just, reasonable, and non-discriminatory.[41]

Given the non-structural safeguards in place in the local exchange market to protect against discrimination and cross-subsidization, additional separation requirements in the interexchange market are unnecessary.[42]

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[40] Traffic originated on a BOC's out-of-region CMRS system constitutes the interLATA provision of CMRS, which is an "incidental" interLATA service beyond the proper scope of this proceeding. *See* § 271(b)(3). Even if such traffic were, *arguendo*, considered out-of-region interLATA service subject to this proceeding, a BOC's out-of-region cellular systems are not bottleneck facilities and are unlikely to be a major source of the BOC's interexchange traffic.

[41] *See Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *First Report and Order*, 10 F.C.C.R. 8962 (1995); *see also Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 5 F.C.C.R. 6786 (1990), *recon.*, 6 F.C.C.R. 2637 (1991), *aff'd sub nom. National Rural Telecom Assoc. v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

[42] The Commission previously removed structural safeguards based on the strength of non-structural safeguards. *See Amendments of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, *Report and Order*, 104 FCC 2d 958, 1063-64 (1986), *recon.*, 2 F.C.C.R. 3035 (1987), *further recon.* 3 F.C.C.R. 1135 (1988), *second further recon.*, 4 F.C.C.R. 5927 (1989); *Phase II Order*, 2 F.C.C.R. 3072 (1988), *recon.*, 3 F.C.C.R. 1150, *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *see also Bell Operating Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, *Report and Order*, 6 F.C.C.R. 7571 (1991), *vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994)("*California III*"). The

B. The Commission's Treatment of Independent LECs As Dominant, Unless Structurally Separated, Was Based On The Now Obsolete "All Services" Approach

The Commission proposes to regulate BOCs as dominant carriers in the provision of interexchange service, unless they satisfy certain separation requirements, based on its adoption of this same approach for independent LECs providing interexchange service. According to the Commission, independent LECs are regulated as dominant carriers, unless they satisfy separation requirements, because they control "bottleneck local exchange facilities."[43]

This rationale is without merit. The Commission's decision to regulate independent LECs as dominant in the provision of interexchange services, unless they satisfied separation requirements, was made under the Commission's "all services approach." Under this approach, the Commission held independent LECs to be dominant in all markets because of their local exchange dominance.[44] As stated above, however, the Commission no longer utilizes the all-services approach for determining dominance. It would be arbitrary and capricious for the Commission to apply its "all services" approach here, having held that it is no longer the proper analysis, merely because it used this approach in an earlier decision involving the independent

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Commission currently is revisiting this issue in the *California III* remand proceeding. *See* Computer III *Further Remand Proceedings*, CC Docket No. 95-20, *Notice of Proposed Rulemaking*, FCC 95-48 (Feb. 21, 1995).

43 *NPRM* at ¶ 9.

44 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, *Fourth Report and Order*, 95 FCC 2d 554, 575-79 ("*Fourth Report*"), *clarified Fifth Report and Order*, 98 FCC 2d 1191, 1195-1200 (1984).

LECs. Accordingly, the Commission's treatment of independent LECs should not be used as a basis for extending dominant regulation to BOCs.[45]

IV. DOMINANT CARRIER REGULATION IS UNWARRANTED BECAUSE IT IMPOSES COSTS WITHOUT ANY CORRESPONDING PUBLIC BENEFIT

As the Commission has recognized, its authority to impose different regulations on dominant and non-dominant carriers is based on the presumption that the costs created by dominant regulation are outweighed by public benefits. Countervailing public benefits are necessary because dominant carrier regulation imposes costs such that "the provision of communications service by those firms can never be as 'efficient' nor can the charges be as 'reasonable' as they might be in the absence of such artificial costs."[46]

Subjecting a BOC to dominant carrier regulation in the interexchange market will subject it to "'burdensome and unequal' regulation that unfairly advantages its competitors and deprives consumers of price reductions and innovative service offerings."[47] Moreover, "the public interest is ill-served by a regulatory process that builds in delay for one service provider and

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45 If anything, the Commission should revisit its decision to subject independent LECs to dominant carrier regulation for out-of-region interexchange services provided without structural separation. Moreover, the *Order* upon which independent LECs were subjected to separation requirements or dominant regulation was vacated. *See MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1196 (D.C. Cir. 1985) (vacating *Fourth Report and Order*).

46 *Competitive Carrier First Report*, 85 FCC 2d at 13; *Fourth Report*, 95 FCC 2d 579 n.81. *See AT&T Non-Dominance Proceeding* at ¶ 32.

47 *AT&T Non-Dominance Proceeding* at ¶¶ 16, 27.

forces it to show its hand to its competitors before it can introduce new service offerings or rate reductions in the market."[48]

It was for these very reasons that the Commission decided to remove dominant carrier regulation from AT&T. It would make little sense to impose these requirements on new entrants with no market power, no customers, and no facilities in the interexchange market, while the three largest incumbent carriers in this market are considered non-dominant and collectively have a 82.7% market share.[49] Such regulation would impose additional costs on the BOCs with no countervailing public benefit. Imposition of dominant carrier regulation in the interexchange market will only impose duplicative, inefficient regulation. Accordingly, BOCs should not be regulated as dominant in the direct provision of interexchange services.

V. IMPOSING STRUCTURAL SEPARATION ON THE BOCs FOR OUT-OF-REGION SERVICE IS UNREASONABLE

The Commission's stated reason for proposing a structural separation requirement is to prevent BOCs from gaining unfair competitive advantages through unreasonably discriminatory practices or cross-subsidization.[50] In other recent decisions, however, the Commission has found structural separation unnecessary. The Commission's decisions concerning structural separation appears to be an arbitrary patchwork of inconsistent and conflicting positions.

In 1993, the Commission considered and rejected a structural separation requirement for

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48 *AT&T Non-Dominance Proceeding*, Statement of Commissioner Rachelle B. Chong at 2.

49 *See* FCC Statistics of Communications Common Carriers, 1994/1995 ed., at 7, Table 1.4.

50 *NPRM* at ¶ 13.

LECs' provision of PCS, including in-region PCS.[51] The mere possibility of discrimination or cross-subsidies, without more, did not warrant structural separation for PCS. Non-structural safeguards were deemed sufficient.

The arbitrary nature of the Commission's decisions with respect to structural separation of major service providers' offerings is apparent from the following chart.

	CELLULAR	PCS	INTEREXCHANGE
BellSouth	Separation - Third Largest Provider[52]	No Separation - Tenth Largest Provider[53]	Separation (proposed) - New Entrant[54]
GTE	No Separation - Second Largest Provider	No Separation - Eighth Largest Provider	Separation - *de minimis* Market Share
AT&T	No Separation - Largest Provider	No Separation- Second Largest Provider	No Separation - Largest Provider

There is no logic here. The largest providers of services are free of any structural separation requirement, while less entrenched providers are subjected to structural separation.

As depicted in the following chart, Congress has deemed structural separation unnecessary for many services. In fact, Congress imposed separation only on the BOCs' provision of in-region, interexchange services, subject to a sunset provision.

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51 *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7751 (1993).

52 Cellular rankings obtained from CTIA Wireless Marketbook, Spring 1995.

53 PCS rankings based on RCR Top 20 PCS Operators, RCR, at 18 (Dec. 4, 1995).

54 Interexchange ranking based on FCC Communications Common Carrier Statistics, 1994/1995 Ed., at 7, Table 1.4.

	CELLULAR	PCS	IN-REGION INTEREXCHANGE	OUT-OF-REGION INTEREXCHANGE
BellSouth	No Separation	No Separation	Separation with Sunset Provision	No Separation
GTE	No Separation	No Separation	No Separation	No Separation
AT&T	No Separation	No Separation	No Separation	No Separation

The FCC's imposition of structural separation requirements beyond those required by Congress requires a substantial justification that is lacking here.

VI. THE COMMISSION SHOULD CLARIFY ITS PROPOSAL WITH REGARD TO THE BOC PROVISION OF INTEREXCHANGE TO CMRS SUBSCRIBERS

The Commission's proposal to require BOCs to satisfy structural separation requirements in order to qualify for regulation as non-dominant carriers in the provision of out-of-region interexchange service is ambiguous with regard to CMRS. Although the Commission states that the "BOC provision to commercial mobile radio service customers, of interstate, interLATA services originating outside any BOC's in-region states, is included in the out-of-region services addressed in this proceeding,"[55] this language is unclear. The statement can be interpreted in two ways: the Commission's proposal either applies to (1) the sale of out-of-region, interexchange service by a BOC to CMRS customers; or (2) the provision of out-of-region, interexchange, CMRS service by a BOC.

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[55] *NPRM* at n.2.

Under the first interpretation, a BOC offering out-of-region, interexchange service to CMRS customers on a stand-alone basis — *i.e.*, not in conjunction with CMRS service offered by the BOC, would be regulated as a dominant carrier unless it offered the service on a structurally separated basis. The BOC would be offering interexchange service only and would be regulated as an interexchange provider. Although BellSouth believes this is the situation which the FCC intended to encompass by its *NPRM*,[56] some parties may argue that this proceeding also covers a BOC offering interexchange, CMRS service. As discussed below, BellSouth believes that such offerings are beyond the scope of this proceeding.

CMRS is defined as a mobile service that is provided for profit and which makes interconnected service available to the public.[57] This definition encompasses, PCS, cellular, and SMR services. To the extent interexchange service is being offered by a CMRS provider *in conjunction with its CMRS service*, the interexchange service also is CMRS. Further, the interexchange service is offered for profit and makes interconnected service available to the public. Thus, the interexchange service falls within the CMRS definition. The bundling of the interexchange and CMRS service constitute a unique, end-to-end service offering. As such, the entire offering should be regulated as CMRS.

Further, CMRS service itself is an interstate, domestic, interexchange service in many cases. PCS markets, for example, cross both state and LATA boundaries. Despite this interexchange nature of CMRS, Congress expressly carved-out CMRS as a service not subject to

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[56] To the extent this is what the Commission intended by footnote 2, BellSouth opposes this proposal for the same reasons it opposes the imposition of dominant carrier regulation on BOCs providing out-of-region interexchange service in general. *See* discussion *supra* pages 1-18.

[57] *See* 47 U.S.C. § 332(d)(1).

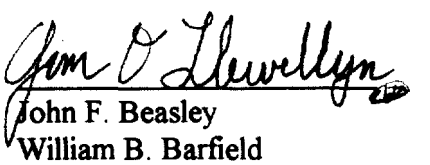
structural separation.[58] Moreover, the Commission has determined that tariff regulation of CMRS is unnecessary.[59] Given the interstate, interLATA nature of CMRS, there is no reason to regulate the provision of interexchange toll service differently than CMRS when offered as a package.

CONCLUSION

For the forgoing reasons, BellSouth urges the Commission to forego adoption of its proposal to regulate BOCs as dominant if they provide interexchange services directly.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

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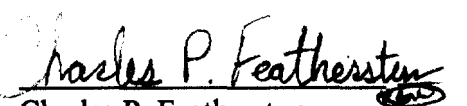
By: 

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[58] *See* 47 U.S.C. § 272(a)(2)(B)(i).

[59] *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1480 (1994).